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In the Supreme Court

OF THE

United States

October Term, 1959

No. 190

HERRMANN, as sole surviving trustee under Trust Agreement dated March 30, 1946, by and between Fred Nicolaus Herrmann, and Frieda Herrmann and Hazel Otis, trustees,

Petitioner,

v.

P. Rogers, Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Pollard E. Pettibone,
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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No.

FRIEDA HERRMANN, as sole remaining trustee under Trust Agreement dated March 30, 1946, by and between Fred Nagel, donor, and Frieda Herrmann and Hazel Ouse, trustees,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner Frieda Herrmann respectfully prays that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for

the Ninth Circuit, adhering to their original judgment upon remand from the United States Supreme Court.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A hereof, *infra* p. i) is reported in 274 F. 2d 846. The opinion and mandate of this Court on the original appeal (Appendix B hereof, *infra* p. viii) is reported in 79 S. Ct. 353.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 25, 1960 (Appendix C hereof, *infra* p. ix), and a motion for rehearing was filed and denied on March 28, 1960 (Appendix D hereof, *infra* p. xi). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals for the Ninth Circuit has properly complied with the remand order of the Supreme Court by adopting a construction of the trust instrument in this case different from that adopted on the original appeal and assumed to be proper by this Court.

STATUTE INVOLVED.

Section 5(b) of the Trading with the Enemy Act, 40 Stat. 425, as amended, 50 U.S.C. App. 5(b).

STATEMENT.

On March 30, 1946, Fred Nagel, an American citizen residing in Idaho, transferred securities of an approximate value of $60,000 in trust to Petitioner Frieda Herrmann and Hazel Ouse (since resigned as trustee), both American citizens. (R. 57.) The trustees were directed to make annual payments of income in their discretion and were directed to pay a part of the trust res to such of fourteen named persons as might come to the United States; none of the named persons have come to the United States. The trustees were also given discretion to pay over to these fourteen persons their part of the principal, "providing that said payment to said beneficiaries shall not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States." (R. 11.) On the death of the last of the fourteen named persons, and if the trust were not sooner terminated, the trustees were directed to divide and pay over the trust fund to the heirs of the bodies of the fourteen persons. (R. 10.)

The trust agreement was written in clear awareness of the Trading with the Enemy Act and was not intended to create any present interest in the trust fund but with the intention and hope of providing an ulti-

mate benefit for the settlor's relatives in Germany. (R. 25-26.) Notice of creation of the trust was given to the Office of the Alien Property Custodian immediately following its establishment. For three years thereafter, no word was received by the trustee or settlor from that office. (R. 21-22.)

On May 12, 1949, the Attorney General issued Vesting Order 13246, purporting to vest under the Trading with the Enemy Act "all right, title, interest and claim" of the fourteen named persons and of the heirs of the body, names unknown, of such persons". (R. 17-19; 60.) On refusal of the trustee to deliver the trust funds, this cause was commenced by the Attorney General under Section 17 of the Trading with the Enemy Act, demanding that the trustee be directed to pay over all trust properties, both principal and income, in her hands. (R. 8-9.)

The District Court entered judgment for the United States on a motion for Summary Judgment without specific construction of the language of the proviso set out above and without taking evidence as to the intent of the settlor in using this ambiguous language. On appeal to the Court of Appeals for the Ninth Circuit the major argument centered about construction of this proviso, the government urging that the language used should be construed by the Court to mean that the gift was conditioned upon its not being subject to confiscation by the German Government and the trustee urging that the language should be construed to mean that the gift was conditioned upon its not being subject to confiscation by any government. The Court

of Appeals sustained the judgment of the District Court, assuming that the language of the proviso should be construed in the manner suggested by the trustee, i.e., that the payment should be made only in the event it would not be subject to confiscation by *any* government. 256 F. 2d 871, 873.

The case was appealed to this Court which granted the petition for certiorari, reversed and remanded directing the Court of Appeals to consider whether "under the law of property of Idaho, it was possible, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary), and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee." (Appendix B, *infra* p. viii.)

Upon remand the Court of Appeals refused to adhere to its original holding and held that the settlor "was 'worried' about 'confiscation' by 'any government antagonistic to the United States', and was worried about creating 'sinews of war for any government antagonistic to the United States' ". (Appendix A, *infra* p. v.) The Court of Appeals refused to heed the trustee's prayer that the case be remanded to the District Court for the purpose of taking evidence for construction of this language should it be determined to still be at issue in this case. Upon this principal ground the Court of Appeals' adherence to its original holding rested. In the light of this construction

the Court of Appeals held that the property was vested in the named beneficiaries since payment to them in 1949 would not be subject to confiscation by Germany and would not create sinews of war for "that conquered nation". (Appendix A, *infra* p. vi.)

REASONS FOR GRANTING THE WRIT.

1. The remand order to the Ninth Circuit Court of Appeals directed consideration of the possibility of acquisition of an interest in the trust by anyone other than a named beneficiary or a person taking through a named beneficiary. The Court of Appeals resolved the problem presented by construing the language of the proviso, providing that payment to the beneficiaries "shall not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States" (R. 11), to mean that the gift was conditioned upon its not being subject to confiscation by Germany. In reaching this conclusion, the Court of Appeals reached a conclusion contrary to the assumed construction of this language upon which its original appeal in this case was based. In the original appeal the Court of Appeals stated:

> "The trustees were also given the discretion to pay over to the designated beneficiaries their stated shares, in their discretion, if they should find that the gift, when paid, would not be subject to confiscation by *any* government nor create sinews of war for any government antagonistic to the United States." Herrmann v. Rogers, 256 F. 2d 871, 873. (Emphasis added.)

In adopting a construction contrary to this upon remand, the Court of Appeals failed to follow the law established by it in this case upon the original appeal and thereby failed to follow the mandate of this Court.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Moscow, Idaho,
June, 1960

Respectfully submitted,

PHILIP E. PETERSON,
TOM FELTON,
Attorneys for Petitioner.

PHILIP E. PETERSON,
FELTON & BIELENBERG,
Of Counsel.

(Appendices A, B, C and D Follow.)

Appendix A

OPINION OF THE NINTH CIRCUIT

"Before: HAMLEY and KOELSCH, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge.

When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.

In the instant case, this Court is functioning under such a remand. Consequently, our jurisdiction is strictly limited by the Supreme Court's mandate. That mandate is our compass and our guide.

1. Statement of the Case.

A full and detailed statement of the case is to be found in our opinion in Hermann v. Rogers, 9 Cir., 1958, 256 F. 2d 871, 872-874, and need not be repeated here.

2. The Remand From the Supreme Court.

On January 26, 1959, in Hermann v. Rogers, 358 U.S. 332, the Supreme Court handed down the following specific mandate to this Court:

"Per curiam.

"The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated,

and the case is remanded to it, to consider whether, under the law of property of Idaho, it was possible, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary), and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee."

3. The Pertinent "Law of Property of Idaho."

The pertinent "law of property of Idaho" is found in the following sections of the Idaho Code, 1957 edition, Volume 9A:

"55-105. Future Interests—When Vested.—A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest."

"55-106. Contingent Interests.—A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain."

"55-109. Transfer and Devolution of Future Interests.—Future interests pass by succession, will and transfer in the same manner as present interests."

"55-110. Possibilities.—A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."

"55-501. Transfer of Possibilities.—A mere possibility not coupled with an interest can not be transferred."

"55-507. Grant Effective on Death Without Heirs. —Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor."

4. **Even If There Is a Possibility That the Trust Property May Revert to the Settlor, That Possibility Is "Inalienable and Unsalable," "Remote," and "Not Favored in Law."**

At this stage of our analysis of the "Trust Agreement," we will assume that there is a possibility that the trust property may revert to the settlor. But that possibility is so unlikely to crystallize into reality that it is negligible.

Let us trace the labyrinthine windings of that possibility. For it to materialize, not a single one of the fourteen named beneficiaries must come to the United States before the settlor's death. Payment to a named beneficiary must at all times be subject to confiscation or "create sinews of war" for a "government antagonistic to the United States." All the fourteen named beneficiaries must die without a single one leaving a lineal descendant.

Now, human life being an uncertain quantity, every one of the above contingencies is possible. But the possibility is so remote as to be tantamount to what the ancient jurists of the common law were wont to term "a shadow of a shade."

In Koehler v. Clark, 9 Cir., 1948, 170 F. 2d 779, 782, this Court characterized "the dominant objective" of

Trading with the Enemy Act of 1917, as amended, as being "to sequester under government control the property of alien enemies and their nationals, so that such property may not be employed in the interest of any enemy government and against the interests of our own Nation."

In a preceding paragraph, we have endeavored to outline the remoteness and tenuousness of the present settlor's reversionary interest in the trust property. In Koehler, such an interest was described as "an inalienable and unsalable possible expectancy"—or at best a "remote" "contingent remainder" "not favored in law." 170 F. 2d at page 783.

In a word, the settlor's interest in the present case consists of "such stuff as dreams are made on."

5. The Beneficiaries' Interests in the Trust Are Final and Indestructible. Consequently, There Is No Possibility of a Reversion to the Settlor or Any One Else.

In her Supplemental Brief, Frieda attempts to reach down into the mind of the settlor of the trust and tell us what he was "worried" about. She says:

> "He was worried not about confiscation by the German government and unsettled conditions abroad but rather about seizure of the property by the United States Government pursuant to the provisions of the 'Trading with the Enemy Act.'"

If we must be interested in the settlor's "worries," let us examine his "Trust Agreement." Paragraph 4 is fully quoted in our previous opinion in this case.

256 F. 2d at page 873. We need here to quote only the proviso that is here pertinent:

> ". . . providing that said payment to said beneficiaries shall not be subject to confiscation by; or create sinews of war for any government antagonistic to the United States."

Thus we see that the settlor of this trust was "worried" about "confiscation" by "any government antagonistic to the United States", and was worried about creating "sinews of war for any government antagonistic to the United States." He plainly said so; and he made no mention whatever in the entire Paragraph Four of what Frieda terms "seizure of the property by the United States Government pursuant to the provisions of the 'Trading with the Enemy Act.'"

Furthermore, Paragraph 3 of the Trust Agreement demonstrates that the settlor neither expected nor desired that there should be any reversion to him; for the last sentence reads as follows:

> "In the event any one of the named beneficiaries herein dies leaving no heirs of his or her body, then and in that event said sums shall be divided amongst the other named beneficiaries or the heirs of their bodies in proportion to their percentage herein set out *so that no property or money will remain in said trust upon its termination.*" (Emphasis supplied.)

Finally, Paragraph 4 clearly shows that the vesting of the remainders in the named beneficiaries was made contingent upon either of two events; namely, "In the event any of the named beneficiaries herein come to the

United States"; or "in the event it is possible for the trustee to pay over to the named beneficiaries herein, at any time after the creation of this trust, the shares respectively going to each," etc.

Frieda's own affidavit shows that at least between March 30, 1946, and July 1949, all the named beneficiaries lived "in the Western Zone of Germany; such Western Zone being the Allied Zone, and not under the control of Russia."

Assuredly, it cannot be said that payment to the named beneficiaries in 1949, at a time when the Allied Forces still occupied Germany, was "subject to confiscation" by prostrate Germany, or would "create sinews of war" for that conquered nation. At that time, at least, the remainders vested finally and irrevocably in the named beneficiaries.

The settlor wanted to assure the beneficiaries of ultimate payment, but he empowered the trustee to defer such payment until conditions in Europe permitted it. Such deferment, however, did not militate against the beneficiaries' acquiring a vested interest in their respective shares in the corpus of the trust.

6. Conclusion.

Even if we assume that there is a possibility that the trust property may revert to the settlor, it is so remote as not to present an interest, under the de minimis rule, of sufficient substance to interfere with the appellee's right to the trust funds.

There is no ground, however, for the above assumption as to the reversion of the property to the settlor.

The named beneficiaries have indefeasibly vested interests.

Accordingly, this Court holds that it was not possible, under the law of property of Idaho, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it, other than through a named beneficiary.

In the light of our determination as to this, we have reconsidered our holding that the appellee United States was entitled to all the trust funds remaining in the hands of the trustee.

Upon such reconsideration, we adhere to our original holding that the appellee United States was so entitled.

(Endorsed) Opinion Filed Jan. 25, 1960.

Frank H. Schmid, Clerk."

Appendix B

MANDATE OF THE SUPREME COURT

"On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Facts and opinion, 9 Cir. 256 F. 2d 871.

Jan. 26, 1959. Per Curiam. The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated, and the cause is remanded to it, to consider whether, *under the law of property of Idaho*, it was possible, after the time of the making of the conveyance, *for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary)*, and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee." (Emphasis supplied.)

Appendix C

United States Court of Appeals for the Ninth Circuit

Frieda Herrmann, etc., Appellant, vs. William P. Rogers, etc., Appellee.	No. 15,233
William P. Rogers, Appellant, vs. Frieda Herrman, Appellee.	

JUDGMENT

Appeals from the United States District Court for the District of Idaho, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Central Division and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed to the extent that it found the plaintiff, the Attorney General entitled to immediate possession of all the assets of the trust created by Fred Nagel, and

that the said judgment is in error in failing to surcharge the trustee with the expenditures made by her on behalf of the beneficiaries subsequent to the date of the vesting order in the amount of $6,088.85, and that this cause be, and hereby is remanded to the said District Court to the end that said judgment insofar as it is concerned with the matter of surcharges may be corrected in accordance with the opinion of this Court, without costs to either party.

Filed and entered: January 25, 1960.

Appendix D

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, March 28, 1960

Before: HAMLEY and KOELSCH, Circuit Judges, Ross, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant Frieda Herrmann, filed February 24, 1960, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.